(3)

No. 95-809

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

LOCKHEED CORPORATION, et al.
Petitioners,
vs.
PAUL L. SPINK,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE ERISA INDUSTRY COMMITTEE, THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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The ERISA Industry Committee ("ERIC"), the Association of Private Pension and Welfare Plans ("APPWP"), and the National Association of Manufacturers (the "NAM") hereby move, pursuant to Rule 37.4, for leave to file the attached brief *amici curiae* in support of the Petition

for Writ of Certiorari. The attached brief addresses solely the court of appeals' ruling that Lockheed engaged in a transaction prohibited by section 406 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1106, when it amended its pension plan to offer enhanced retirement benefits to eligible employees who agreed to waive certain employment-related claims. While Petitioners have consented to the filing of the attached brief, Respondent has declined to consent. Correspondence reflecting the parties' respective positions has been lodged with the Clerk.

ERIC is a non-profit organization representing over 120 major employers, virtually all of whom maintain defined benefit pension plans governed by ERISA and who therefore could be affected adversely by the court of appeals' decision. APPWP is a non-profit association whose members include both small and large employers (including many *Fortune* 500 companies), as well as numerous plan support organizations, such as consulting and actuarial firms, investment firms, banks, insurers, and other professional benefit organizations. The NAM is the nation's oldest and largest broad-based industrial trade association; its nearly 13,500 member companies and their subsidiaries employ approximately 85 percent of all manufacturing workers and produce over 80 percent of the nation's manufactured goods.

ERIC and APPWP frequently participate as *amici curiae* in cases with the potential for far-reaching effects on employee benefit plan design or administration.[1] The NAM often

[1] *See, e.g., New York State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 115 S. Ct. 1671 (1995); *Curtiss-Wright Corp.* v. *Schoonejongen*, 115 S. Ct. 1223 (1995); *Patterson* v. *Shumate*, 504 U.S. 753 (1992); *Public Employees Retirement Sys. of Ohio* v. *Betts*, 492 U.S.

(continued...)

participates as *amicus curiae* in cases raising issues of importance to the business community.[2]

Because the court of appeals' decision casts doubt on the lawfulness of many traditional benefit plan provisions and practices, the *amici* have a profound interest in the resolution of this case. In addition, the court of appeals' decision creates uncertainty throughout the country regarding the enforceability of the many thousands of releases that have been executed in recent years by retiring employees in exchange for enhanced early retirement benefits under their employers' retirement plans. The court of appeals' decision also will have a major impact on the design of early retirement incentive programs that employers wish to offer their employees in the future. Moreover, the court of appeals' decision creates uncertainty about the lawfulness of many other commonplace employee benefit arrangements entered into by employers and employees throughout the country.

ERIC, APPWP, and the NAM believe that as *amici curiae* they can present to the Court the perspective of the many thousands of employers that have sponsored early retirement incentive programs and other employee benefit plans potentially affected by the court of appeals' decision and

[1](...continued)
158 (1989); *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989); *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U.S. 58 (1987); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1983); *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *International Bd. of Teamsters* v. *Daniel*, 439 U.S. 551 (1979).

[2] *See, e.g., National Posters, Inc.* v. *NLRB*, 494 U.S. 1026 (1990).

thereby help the Court to understand the far-reaching significance of this case to countless employers and employees throughout the country.

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Regulations

Legislative History

Administrative

Page

Miscellaneous

Page

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The ERISA Industry Committee ("ERIC"), the Association of Private Pension and Welfare Plans ("APPWP"), and the National Association of Manufacturers (the "NAM") submit this brief *amici curiae* in support of the Petition for Writ of Certiorari. This brief addresses solely the court of appeals' ruling that Lockheed engaged in a transaction prohibited by section 406 of the Employee Retirement Income

Security Act of 1974 ("ERISA"), 29 U.S.C. § 1106, when it amended its pension plan to offer enhanced retirement benefits to eligible employees who agreed to waive certain employment-related claims.

INTEREST OF *AMICI CURIAE*

The interest of ERIC, APPWP, and the NAM is set forth in the foregoing Motion for Leave to File.

SUMMARY OF ARGUMENT

The Court should review and reverse the court of appeals' decision.

The court of appeals' decision creates uncertainty about the enforceability of the many thousands of releases that have been executed in exchange for early retirement incentive benefits, a practice that has been approved by Congress, the Treasury Department, and the courts. In addition, unless it is reviewed and reversed, the court of appeals' decision will have a chilling effect on employers that wish to offer early retirement incentive benefits to their employees in the future.

Moreover, because the advantages that Lockheed derived from the releases in this case are not distinguishable from many other advantages that employers routinely receive from the employee benefit plans that they sponsor, the decision below creates uncertainty about the lawfulness of many other conventional employment practices. As a result, unless it is reviewed and reversed, the court of appeals' decision will cast doubt on the lawfulness of a wide array of commonplace employee benefit arrangements entered into by employers and employees throughout the country.

Finally, the Court should review and reverse the court of appeals' decision because the decision is inconsistent with the language and the purposes of ERISA's prohibited transaction provisions and with the decisions of other appellate courts.

ARGUMENT

I. The Decision Below Creates Uncertainty About the Enforceability of the Many Thousands of Releases That Have Been Executed in Exchange for Early Retirement Incentive Benefits, a Practice That Has Been Approved by Congress, the Treasury Department, and the Courts.

A. Early Retirement Incentive Programs Serve Important Social And Economic Purposes.

During the 1980's and 1990's, international competitive pressures, technological changes, and down-turns in economic activity have forced many large U.S. employers to make substantial reductions in their workforces. Downsizing is not limited to employers whose overall business is temporarily or permanently contracting, however. Even an employer whose overall business and workforce are growing might need to reduce the size of its workforce in particular divisions or job categories in response to competitive pressures, changing markets, or technological change.

Faced with the need to downsize some or all of its workforce, an employer has two general choices: it can downsize through voluntary measures, such as early retirement window programs, or through involuntary measures, such as layoffs. Employers and employees generally prefer a voluntary program to the drastic approach of laying off large numbers of employees.

An involuntary program could well lead to the layoff of many employees who wish to continue working, yet leave in

place other employees who are on the verge of leaving anyway, either for retirement or alternative employment. By contrast, a voluntary program allows eligible employees to decide for themselves whether they wish to continue working for the company or to leave the company with enhanced benefits. Moreover, in many cases a voluntary program permits an employee to retire early with benefits that are comparable to or better than the benefits the employee would receive if he or she continued to work and retired several years later. Voluntary programs thus provide opportunities and benefits that generally are not available under involuntary programs.

Offering employees an incentive to retire voluntarily during a designated period of time (often referred to as an "early retirement window") can reduce and sometimes eliminate the need for involuntary reductions-in-force and create opportunities for younger employees.[1] The use of early retirement incentives "is a common corporate practice utilized to prevent individual hardship. It is a humane practice well accepted by both employers and employees . . . ." *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339, 344 (D.C. Cir.), *cert. denied*, 464 U.S. 994 (1983).[2]

[1] HEWITT ASSOCIATES, PLAN DESIGN AND EXPERIENCE IN EARLY RETIREMENT WINDOWS AND IN OTHER VOLUNTARY SEPARATION PLANS 5 (1986).

[2] "Provided the employee may decline the offer and keep working under lawful conditions, the offer [of enhanced early retirement benefits] makes him better off. He has an additional option, one that may be . . . worth a good deal of money. He may retire, receive the value of the package, and either take a new job (increasing his income) or enjoy new leisure." *Henn v. National Geographic Soc'y*, 819 F.2d 824, 826 (7th Cir. 1987). *See also* S. Rep. No. 263, 101st Cong., 2d Sess. 52 (1990) ("Early retirement incentive plans are extremely popular with older (continued...)

B. The Practice Of Offering Early Retirement Incentive Benefits In Exchange For A Release Is Widespread.

The use of releases in connection with early retirement incentive programs is widespread. "About 80 percent of *Fortune* 100 companies sponsored an exit incentive program at least once during 1979 through 1988 . . . about 55 percent of a sample of large companies (25,000 or more employees) offered such programs at least once between 1981 and 1985." U.S. GENERAL ACCOUNTING OFFICE, AGE DISCRIMINATION: USE OF WAIVERS BY LARGE COMPANIES OFFERING EXIT INCENTIVES TO EMPLOYEES 2 (Apr. 1989) (footnote omitted) ("1989 GAO Report"). In fact, for some employers, early retirement incentives are a routine way to thin the ranks of their employees. The 1989 GAO Report's survey of *Fortune* 100 companies found that of the 80 percent that sponsored an exit incentive program at least once between 1979 and 1988, about 61 percent did so in more than one year. *Id.* at 4.[3]

The use of early retirement incentive plans has not abated since the 1989 GAO Report. A 1994 survey report by The Wyatt Company found that of the 388 companies with defined benefit pension plans that responded to the survey, 27 percent had offered at least one early retirement incentive plan

[2](...continued)
workers. Moreover, they benefit the entire workforce to the extent that sufficient voluntary retirements avoid the need for involuntary layoffs . . . .").

[3] In 1992, the Internal Revenue Service, in response to requests from major employers, ruled that, in appropriate circumstances, an employer may make repeated offerings of early retirement incentive benefits without causing those benefits to become a permanent feature of the employer's pension plan. *See* Rev. Rul. 92-66, 1992-1 C.B. 92.

between 1991 and 1993 and that, of the companies offering early retirement incentive plans, 20 percent offered more than one plan during the 1991-1993 period. THE WYATT COMPANY, SURVEY REPORT: DESIGNING AN EFFECTIVE EARLY RETIREMENT WINDOW 2 (1994).[4]

Many employers offering early retirement incentive plans require eligible employees to waive employment-related claims as a condition of receiving enhanced retirement benefits. The 1989 GAO Report found that about 30 percent of the *Fortune* 100 companies that sponsored an exit incentive program required employees to sign a waiver in order to receive enhanced benefits. 1989 GAO Report 2. Another study found that about 25 percent of the companies with early retirement incentive programs required releases as a condition of receiving enhanced benefits. Grant, *The "Open Window" — Special Early Retirement Plans in Transition*, 16 EMPLOYEE BENEFITS JOURNAL 10, 15 (1991).

C. When It Enacted The Older Workers Benefit Protection Act, Congress Explicitly Sanctioned The Practice Of Offering Exit Incentive Benefits To Employees Who Execute Releases.

Congress has explicitly approved the practice of offering exit incentive benefits to employees who execute releases. The Older Workers Benefit Protection Act of 1990, Pub. L.

[4] "The number of companies [participating in the survey] offering windows rose steadily from 22 (roughly 4% of all respondents) in 1989 to 59 (slightly more than 11%) in 1992." TOWERS, PERRIN, FORSTER & CROSBY, INC., MONITOR (SEPT. 1922). *See also* HEWITT ASSOCIATES, EARLY RETIREMENT WINDOWS, LUMP SUM OPTIONS, AND POSTRETIREMENT INCREASES IN PENSION PLANS 1 (1992) ("Hardly a week passes without mention in the popular press of another company offering an early retirement window program.").

No. 101-433, 104 Stat. 978 ("OWBPA"), provides explicitly that it is not a violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.*, for the employer to observe the terms of a "voluntary early retirement incentive plan" if the plan is "consistent with the relevant purpose or purposes of this Act." OWBPA, § 103, amending 29 U.S.C. § 623(f)(2). In addition, the OWBPA expressly recognizes that a release or waiver may be given "in connection with an exit incentive or other employment termination program offered to a group or class of employees," and specifies the standards that a waiver must meet in these circumstances in order to be enforceable. *See* OWBPA § 201, amending 29 U.S.C. § 626(f)(1).[5]

The OWBPA thus shows that Congress intended to permit employers to require a waiver of ADEA claims as a condition of receiving early retirement benefits, and neither the OWBPA nor its legislative history contains the slightest suggestion that a waiver under an early retirement incentive plan violates ERISA. This certainly was not because Congress had forgotten about ERISA; the OWBPA provisions governing early retirement benefits refer specifically to ERISA. *See* OWBPA § 103, amending 29 U.S.C. § 623(*l*)(1).

It is implausible that when it enacted the OWBPA, and allowed employers to require a waiver of ADEA claims as a condition of receiving enhanced early retirement benefits,

[5] "S. 1511 permits early retirement incentive plans that are both truly voluntary and consistent with the relevant purpose or purposes of the ADEA. . . . In addition, if a waiver is requested from a group of employees as part of an exit incentive program, the following additional procedural requirements must be met: the employer must provide specific information about the eligibility factors for inclusion of individuals in the program and the age profiles of individuals who are included in and excluded from the program." 136 Cong. Rec. H8618-19 (daily ed. Oct. 2, 1990) (Explanation of S. 1511).

Congress was approving a practice that was prohibited by ERISA.[6]

D. **Treasury Department Regulations Approve The Practice Of Granting Enhanced Retirement Benefits To Employees Who Execute Releases.**

Treasury Department regulations recognize that pension plans may condition the receipt of benefits on covenants not to compete and on waivers as long as the Internal Revenue Code's nondiscrimination standards are met and the provision does not cause an employee to lose vested benefits.[7] Although the Treasury Department's views are entitled to deference here, the court of appeals' discussion of the release issue does not even refer to the Treasury Department's regulations.[8]

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[6] *See also infra* p. 13 (pension benefits may be used to offset employer's obligation under Davis-Bacon Act).

[7] *See* Treas. Reg. §§ 1.411(a)-4(c), Example (1), 1.401(a)(4)-4(b)(2)(ii)(B); Temp. Treas. Reg. § 1.411(a)-4T(c), Example (1); *see also* Treas. Reg. § 1.401(a)(4)-3(f)(4)(ii)(A) & (D) (relying on § 1.401(a)(4)-4(b)(2) for purposes of applying the nondiscrimination standards to an early retirement window plan). In addition, the Internal Revenue Service has ruled that a prohibited transaction does not occur merely because a funded pension plan is amended to assume responsibility for benefits previously paid from the employer's general assets. *See* Tech. Adv. Mem. 9516005 (Dec. 22, 1994).

[8] ERISA's prohibited transaction provisions appear in both Title I and Title II of ERISA. The Department of Labor is principally responsible for the administration of the Title I provisions, while the Treasury Department is principally responsible for the administration of the Title II provisions. The standards of conduct established by the two (continued...)

The Treasury's regulations would be meaningless if ERISA prohibited an employer from amending a plan to impose a waiver requirement. It is implausible, to say the least, that this expert federal agency, which is responsible for the administration of the ERISA provisions that appear in the Internal Revenue Code, would have issued regulations that explicitly sanction a practice that ERISA forbids.

E. **Courts In Other Circuits Have Upheld Releases And Settlements In Which Employer Liability For Various Claims Is Reduced Or Eliminated In Exchange For Enhanced Pension Benefits.**

The court of appeals' opinion fails to recognize that other courts have upheld the validity of releases given in exchange for enhanced retirement and other benefits under employee benefit plans.[9] These cases contain not the slightest suggestion that the releases violated ERISA.

The decisions in these cases would be pointless if the releases violated ERISA.[10] The panel's decision is thus

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[8](...continued)
sets of prohibited transaction provisions are nearly identical. *Compare* ERISA §§ 406-08, 29 U.S.C. §§ 1106-08, *with* Int. Rev. Code § 4975. *See generally* H.R. Rep. No. 1280, 93d Cong., 2d Sess. 306-323 (1974) (explaining the operation of the Title I and Title II provisions); Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47713 (Oct. 17, 1978) (recognizing overlap of Labor and Treasury responsibilities).

[9] *See, e.g.*, *Astor v. International Business Machines Corp.*, 7 F.3d 533 (6th Cir. 1993); *Cirillo v. ARCO Chemical Co.*, 862 F.2d 448 (3d Cir. 1988).

[10] The fact that ERISA regulates employee benefit plans is hardly an obscure or subtle point. The plaintiffs in *Astor*, *supra*, sued under (continued...)

incompatible with a sound body of law upholding the enforceability of releases given in exchange for additional benefits under ERISA-governed plans.

Settlements of and judgments in age discrimination lawsuits, including suits filed by the EEOC, frequently require defendant employers to amend their pension plans to provide enhanced benefits in exchange for the plaintiffs dropping their claims for monetary damages or agreeing to accept reduced payments directly from the defendant employer.[11] Here too, under the rationale of the court of appeals, these are prohibited transactions akin to an employer's writing checks on a pension fund in order to settle lawsuits. There is no evidence to suggest that ERISA was intended to bar these judgments and settlements.

II. The Decision Below Has a Chilling Effect on Employers That Wish To Offer Early Retirement Incentives To Their Employees.

Unless it is reviewed and reversed, the court of appeals' decision will deter employers throughout the country from offering early retirement incentive benefits to employees. Because early retirement incentive programs are commonly used to effect workforce reductions and serve important social

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[10](...continued)
and the court emphasized that the plan was governed by ERISA. 7 F.3d at 534, 536-37.

[11] *See, e.g.*, 150 BNA Daily Labor Reporter at A-3 (Aug. 4, 1995) (consent decree in *EEOC v. McDonnell Douglas Corp.*, No. 4:93-CV-526 (E.D. Mo)); *see also* Priv. Ltr. Rul. 8536064 (June 12, 1985) (additional pension benefits provided as part of settlement of class action challenging termination of health benefits).

purposes, the widespread chilling effect of the court of appeals' decision warrants the grant of certiorari in this case.

As long as the court of appeals' decision remains in effect, an employer offering enhanced retirement benefits to employees who agree to waive employment-related claims will be exposed to the risk of litigation brought by current or former employees who claim that the employer has engaged in a prohibited transaction under ERISA and/or that the waivers are void.

Although an employer might wish to reduce its workforce through a voluntary incentive program rather than through involuntary layoffs, a rational employer will choose to provide enhanced retirement benefits under a voluntary program only if the value it derives from providing those benefits exceeds the cost of providing them. Waivers of employment-related claims reduce the employer's exposure to claims by retired employees, including the litigation expenses for which the employer must budget. In the past, many employers concluded that they could derive substantial value from an offer of enhanced early retirement incentive benefits to those employees who agreed to waive employment-related claims and that this value justified the cost of providing the enhanced benefits.

But if an employer cannot limit early retirement incentive benefits to those employees who agree to sign waivers, some employers will decide to make workforce reductions by relying instead solely on involuntary workforce reduction programs. If employers cannot enforce the waivers they obtain in exchange for early retirement incentive benefits, and remain exposed to employment-related litigation, employers can be expected to choose not to incur the cost of offering early retirement incentive benefits, to achieve their workforce reduction objectives through involuntary layoffs, and to apply the resulting cost savings to their litigation budgets. Others

will scale down any enhanced benefits that they offer under a voluntary program, in recognition of their continued exposure to employment-related claims by former employees. Thus, both employers and employees will be harmed unless the Court reviews and reverses the court of appeals' decision.

III. Because the Advantages That Lockheed Derived From the Releases Are Not Distinguishable From Many Other Advantages That Employers Routinely Receive From Employee Benefit Plans, the Decision Below Creates Uncertainty About the Lawfulness of Many Other Widespread Employment Practices.

The court of appeals held that because Lockheed derived "significant" benefits from the releases that the plan required of those electing enhanced retirement benefits, Lockheed violated section 406(a)(1)(D) of ERISA, 29 U.S.C. § 1106(a)(1)(D), which prohibits a fiduciary from causing a plan to engage in a transaction if he or she knows or should know that the transaction "constitutes a direct or indirect . . . transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan . . . ." In so holding, the court of appeals failed to recognize that the advantages Lockheed derived from its early retirement program are no different from many advantages that employers routinely derive from their employee benefit plans. The availability of such advantages is a principal reason employers establish such

plans,[12] and there is no reason to believe that Congress intended such advantages to violate ERISA.

For example, employers negotiating with trade unions frequently reach agreements in which the *quid pro quo* for enhanced retirement benefits is lesser wage increases, outright wage reductions, or other changes in the conditions of employment that benefit the employer. Although such agreements obviously benefit the employer (for example, by reducing wage costs), no court or government agency has ever suggested, or reasonably could suggest, that a negotiated exchange of enhanced retirement benefits for reduced wage costs violates ERISA.

Similarly, a government contractor may offset its prevailing wage obligation under the Davis-Bacon Act with any pension benefits it provides to its employees under an ERISA-governed plan.[13] This use of pension assets provides a benefit to the contractor that is every bit as substantial and direct as the benefits Lockheed received from the releases in this case. The court of appeals' decision simply cannot be reconciled with the congressionally approved practice of using pension benefits to offset a contractor's prevailing wage obligation under the Davis-Bacon Act.

Some employers allow employees to participate in a pension plan only if they agree in exchange to reduce their

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[12] ERISA neither requires an employer to adopt an employee benefit plan nor dictates the level of benefits that a plan must provide. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511-12 (1981); H.R. Rep. No. 533, 93d Cong., 1st Sess. 2 (1973).

[13] *See* 40 U.S.C. § 267a(b); 29 C.F.R. § 5.31 (1995); U.S. TREAS. DEP'T, STUDY OF THE EFFECT OF THE MINIMUM PARTICIPATION REQUIREMENTS ON GOVERNMENT CONTRACTORS 2-6 (March 1991).

cash compensation. By striking such a bargain, the employer reduces its wage costs, and employees obtain retirement benefits. It has never been suggested that such arrangements are unlawful and, indeed, they are expressly recognized by Treasury Department regulations. *See* Treas. Reg. § 1.401(k)-1(a)(3)(iv) (excluding from the definition of a "cash or deferred election" a one-time irrevocable election to receive contributions or benefit accruals under a pension plan); *see also* IRS Announcement 94-101, § 441.1, 1994-35 I.R.B. 53.

Even where there is no explicit increase in pension benefits in exchange for a reduction in pay, such trade-offs are often made implicitly. Employers attract and retain employees on the basis of their total offerings of compensation and benefits. For example, an employer might find it cost-effective to offer employees above-average retirement benefits together with below-average current compensation. In these circumstances, the employer derives a monetary benefit from its retirement plan that is no less significant or direct than the benefits Lockheed derived from the releases in this case.[14]

Likewise employers that offer early retirement incentive plans without seeking releases from their employees benefit from the resulting reductions in wage and benefit costs. Such benefits have never been found to violate ERISA even though they are plainly designed to serve the employer's business needs by reducing employee headcount.[15]

[14] *See generally* RONALD G. EHRENBERG AND ROBERT S. SMITH, MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY 394-406 (3d ed. 1988); ALICIA H. MUNNELL, THE ECONOMICS OF PRIVATE PENSIONS 3 (1982).

[15] *See, e.g., Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 283-84 (3d Cir. 1988); *Trenton v. Scott Paper Co.*, 832 F.2d 806, 808-09 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022 (1988). Similarly, some (continued...)

Some exit incentive programs offer severance benefits and retiree health benefits through a trust similar to a pension trust.[16] Because severance and retiree health plans are governed by ERISA's fiduciary responsibility provisions,[17] the court of appeals' decision applies to exit incentive plans that offer severance and retiree health benefits. According to the court of appeals' decision, an employer engages in a prohibited transaction if it uses a trust fund to provide severance or retiree medical benefits to employees who agree to terminate employment and execute a release.

In sum, the benefits Lockheed derived from its plan amendment do not differ in degree or in kind from the benefits enjoyed by employers under many commonplace arrangements. If the court of appeals' decision is correct, ERISA has, for over 20 years and unbeknownst to Congress, employers, unions, and government agencies, outlawed countless traditional employment arrangements that employers, unions, and employees rely on every day. There is no reason

[15](...continued)
employers offer early retirement incentive benefits only to employees who agree to work until a specified future retirement date. These employers directly benefit both from the additional services rendered by the participating employees and from the reduction in payroll costs incident to the employees' retirement.

[16] *See* 29 U.S.C. § 623(*l*)(2) (recognizing that exit incentive programs provide retiree health and severance benefits); Int. Rev. Code § 501(c)(9) (tax exemption for a voluntary employees' beneficiary association [a "VEBA"]; Treas. Reg. § 1.501(c)(9)-3(c), (d), (e) (permitting a VEBA to provide severance benefits and health benefits); *see also* Int. Rev. Code § 419A(c)(2), (3) (reserves for severance and retiree health benefits).

[17] *See* ERISA § 401(a), 29 U.S.C. § 1101(a).

to believe that this is what Congress intended when it enacted ERISA.

IV. The Decision Below Is Inconsistent With Both the Language and the Purposes of ERISA's Prohibited Transaction Provisions.

The court of appeals' opinion overlooks two critical points: first, section 406(a)(1)(D) prohibits only transactions involving plan *fiduciaries*, and second, ERISA's legislative history shows that the prohibited transaction provisions were never intended to apply to the payment of benefits pursuant to duly adopted plan amendments.

Section 406(a)(1) provides that "a fiduciary" shall not cause a plan to engage in certain prohibited transactions. Thus, section 406(a)(1) applies only if "a fiduciary" causes the transaction in question to occur. If Lockheed did not act as a fiduciary when it amended its pension plan, it could not have violated section 406(a)(1).

In fact, the court of appeals did not find, and could not have found, that Lockheed acted as a fiduciary when it amended the plan, in light of the well established rule that an employer does not act as a fiduciary when it acts to establish, amend, or terminate a plan. All of the courts of appeals that have considered the matter have distinguished between plan administration, to which ERISA's fiduciary duties apply, and plan design, which is reserved to the employer in its capacity as settlor and is not subject to the fiduciary duties that apply to plan administration.[18]

[18] *See, e.g.*, *Akers v. Palmer*, No. 94-5740, 1995 U.S. App. LEXIS 34607, at *9 (6th Cir. Dec. 11, 1995) ("a company is only subject to fiduciary restrictions when managing a plan according to its (continued...)

For example, in *Milwaukee Area Joint Apprenticeship Training Comm. v. Howell*, 67 F.3d 1333 (7th Cir. 1995), the Seventh Circuit considered the lawfulness of a scholarship loan agreement under which an ERISA-governed apprenticeship training fund made a loan to an apprentice. The apprentice was free to leave the electrical industry with no obligation to repay the loan. But if the apprentice accepted employment within the electrical industry, his only options were (1) to repay the loan in kind by working for an employer that contributed to the plan or (2) to default under the loan by working for a non-contributing employer and to repay the loan in cash.

After the district court held that the apprentice was not required to repay his loan on the ground that the loan program violated ERISA (apparently on the theory that the loan terms impermissibly benefited contributing employers), the Seventh Circuit reversed on the ground that the district court had

> failed to recognize the distinction between the scope of fiduciary duties owed during plan administration and the lack of fiduciary duties owed during plan design or amendment.
>
> . . . As this Circuit has previously noted, it would contravene Congress's intent for this Court to

[18](...continued) terms, but not when it decides what those terms are to be"); *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184, 1188 (7th Cir. 1994) (when amending a plan, an employer does not act as a fiduciary); *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986) (ERISA allows an employer-administrator "to wear 'two hats,'" assuming fiduciary duties only when and to the extent it acts as plan administrator, not when, *e.g.*, amending a plan); *Trenton*, *supra*, 832 F.2d at 808-09 (design of early retirement plan "was purely a corporate management decision").

> dictate the content of a welfare benefit plan. As such, this Circuit has held that "an employer unilaterally may change or abolish [a welfare benefit plan] without violating ERISA."

67 F.3d at 1338 (citations omitted).[19]

This well accepted view is compelled by ERISA's definition of a "fiduciary," which provides, in general, that a person is a fiduciary of a plan only "to the extent" that he or she has control or authority over "management" or "administration" of the plan or "management or disposition of its assets." ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Because Lockheed was not engaged in the management or administration of the plan or its assets when it amended the plan, it was not acting as a fiduciary and could not possibly have violated section 406(a)(1)(D).

The court of appeals argued that because section 406(a)(1)(D) "would clearly forbid Lockheed from writing checks drawn on pension funds to buy the releases in question," 60 F.3d at 623, so too section 406(a)(1)(D) must prohibit plan amendments that result in plan funds being used to buy releases. This facile argument is not only inconsistent with a literal reading of section 406(a)(1)(D) (which on its face applies only to fiduciaries), but also ignores the fact that Lockheed, like other employers, is free under ERISA to terminate its pension plan and thereafter to use the plan's surplus for any purpose the employer deems appropriate,

[19] A scholarship plan is classified as a welfare plan under ERISA. ERISA's fiduciary duty provisions apply to both welfare plans and pension plans. *See* ERISA § 401(a), 29 U.S.C. § 1101(a).

including the purchase of releases.[20] The termination of a pension plan and recovery of the plan's surplus assets by the employer are permissible under ERISA for the same reason that Lockheed's plan amendment is permissible: they involve questions of plan design, which are simply not governed by ERISA's fiduciary duties.

The prohibited transaction provisions of Title I were designed to protect a plan from being damaged by abuses by fiduciaries in the management of plan assets, not to influence plan design or to curb the distribution of plan benefits.[21] There is no basis in the text, purpose, or legislative history of the statute for concluding that Lockheed's amendment of its plan to provide enhanced retirement benefits violated section 406(a)(1)(D).

[20] *See, e.g., District 65, UAW v. Harper & Row, Publishers, Inc.*, 576 F. Supp. 1468, 1477-78 (S.D.N.Y. 1983); Letter from Hon. Dennis M. Kass, Ass't Sec'y Dept. of Labor, to Hon. Edward R. Roybal, Chairman, House Select Committee on Aging, *reprinted in* 13 BNA Pension Reporter 2080, 2081 (Nov. 18, 1986); Letter from Hon. Dennis M. Kass, Ass't Sec'y Dept. of Labor, to John N. Erlenborn, Chairman, Advisory Council on Employee Welfare & Pension Benefit Plans, *reprinted in* 13 BNA Pension Reporter 472 (Mar. 13, 1986).

[21] *See Commissioner v. Keystone Consol. Indus.*, 113 S.Ct. 2006, 2012 (1993) ("Congress' goal was to bar categorically a transaction that was likely to injure the pension plan."); *Milwaukee Area Joint Apprenticeship Training Comm.*, *supra*, 67 F.3d at 1338 (Congress did not intend ERISA's fiduciary responsibility provisions to dictate the terms of a plan); H.R. Rep. No. 1280, *supra*, at 306 ("Under the labor provisions (title I), *the fiduciary is the main focus of the prohibited transaction rules.*") (emphasis added); S. Rep. No. 383, 93d Cong., 1st Sess. 99 (1973) ("To prevent discrimination against fiduciaries and parties in interest, the bill permits these persons to receive any benefits to which they are entitled as participants or beneficiaries in the plan."); H.R. Rep. No. 533, *supra*, 7, 11-13, 21 (1973) (fiduciary responsibility provisions are concerned with plan administration and operation).

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant certiorari in this case.

Respectfully submitted,

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